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NO. 82-256

IN THE
Supreme Court of the United States
OCTOBER TERM, 1982

THE STATE OF MICHIGAN, PETITIONER

V.

DAVID KERK LONG, RESPONDENT

ON WRIT OF CERTIORARI TO THE
SUPREME COURT OF THE STATE OF MICHIGAN

BRIEF OF AMICI CURIAE, GULF & GREAT PLAINS LEGAL FOUNDATION OF AMERICA, JOINED BY AMERICANS FOR EFFECTIVE LAW ENFORCEMENT, INC., IN SUPPORT OF PETITIONER STATE OF MICHIGAN

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INTEREST OF AMICI CURIAE

Gulf & Great Plains Legal Foundation of America ("GGP") is a nonprofit, tax-exempt corporation supporting the operations of a public interest law firm. Among other goals, it seeks to preserve a rational system of criminal justice, in which adjudications of guilt or innocence are reliable. GGP has appeared as amicus curiae in this honorable Supreme Court, in the federal courts of appeals, in federal district courts, and in various state courts, in cases involving criminal justice issues. In particular, GGP considers that the law of search and seizure has reached a point at which its unpredictability detracts seriously from

the performance of both the courts and the criminal justice system.[1]

Americans for Effective Law Enforcement, Inc. ("AELE"), as a national not-for-profit citizens organization, is interested in establishing a body of law making the police effort more effective, in a constitutional manner. It seeks to improve the operation of the police function to protect our citizens in their life, liberties and property, within the framework of the various state and federal Constitutions. AELE has previously appeared as amicus curiae forty-five times in the Supreme Court of the United States and thirty-three times in other courts, including the federal district courts, the federal courts of appeals, and various state courts, such as the supreme courts of California, Illinois, Ohio and Missouri.

Amici curiae will not attempt to duplicate the detailed case law analysis done by Petitioner, the State of Michigan, although we agree with that analysis and wish to express support for it. Further, amici curiae agree with, but will not repeat, Michigan's arguments supporting the legality of the inventory that discovered the larger quantity of contraband in the vehicle's trunk.

Instead, amici curiae appear primarily for the purpose of discussing the practical realities of traffic stops, which are a leading cause of officer fatalities. These concerns center upon that portion of the Michigan Supreme Court's holding that would apparently prevent an officer from conducting even the briefest

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1 GGP functions nationwide, although its office and efforts are concentrated in the States of the Gulf Coast and Great Plains regions. All litigation undertaken by GGP is approved by its Board of Directors, who are attorneys and businessmen and women residing throughout the Midwestern area. GGP does not accept private fees, but is funded by public contributions.

sort of frisk[2] of a vehicle's interior once its occupants have exited. If followed, this reasoning would lead either to increased officer fatalities or to substitution of other police practices that are more intrusive than the frisk at issue. There is an urgent need for a practical, workable guide to permissible police conduct in this unstable area of the law.

STATEMENT OF THE CASE

Amici curiae adopt the statement of the case made by Petitioner, the State of Michigan.

SUMMARY OF ARGUMENT

I.

The Michigan Supreme Court concluded that the preferable procedure for an officer conducting a traffic stop was to physically maintain a blocking position with his body to prevent the detained person from re-entering the vehicle, rather than securing the scene initially to allow a peaceful episode. The Michigan court's approach ignores such practical factors as traffic conditions, distractions, field investigatory needs, the presence of other persons, the existence of reasons for allowing the suspect to re-enter the vehicle, and the myriad other conditions comprising the "protean variety of the street encounter," Terry v. Ohio, 392 U.S. 1, 15 (1968), which will often make body position an unworkable means of ensuring safety throughout the duration of a traffic stop.

The Michigan court's approach also prevents the regular, systematic and repeatable procedures that are the essence of

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2 We have applied the term "frisk" to this action because it was brief, superficial, nonintrusive, and limited in purpose to discovery of weapons. Although a "frisk" has traditionally been thought of as a superficial search of a person, we respectfully submit that there is no reason that similar superficial searches of vehicle interiors should not be described similarly. Indeed, as is argued in Part II of this brief, below, the superficial search or frisk of a vehicle is less intrusive of privacy interests than a search of a person.

police professionalism. Police training emphasizes the unpredictability of persons subjected to detention. The officer who ignores nonintrusive standard safety procedures increases the danger of a violent encounter that may injure not only him, but the suspect or a bystander as well.

II.

The Michigan court's conclusion that Terry v. Ohio allowed only frisks of persons, and not frisks of places, puts fourth amendment values exactly backward. The fourth amendment protects people, not places. The brief frisk of the armrest in this case was less intrusive than the body frisk approved in Terry and carried with it none of the dangers of abuse recognized in that decision.

III.

The disallowance of intermediate means for securing safety would force officers to take the kind of "all or nothing approach" disapproved in Terry v. Ohio. Officers would be forced in discretionary situations to conduct full scale arrests that would otherwise be unnecessary because of the unavailability of less intrusive measures such as the armrest frisk at issue in this case.

ARGUMENT AND AUTHORITIES

I. THE MICHIGAN SUPREME COURT'S DECISION INVALIDATES A REASONABLE PROCEDURE NECESSARY TO PREVENT OFFICER FATALITIES.

As this Court has recognized, traffic stops result in a high percentage of officer fatalities. See, e.g., Adams. v. Williams, 407 U.S. 143, 148 n. 3 (1972) (citing study showing that approximately 30 per cent of police shootings occurred when a police officer approached an automobile); accord, Pennsylvania v. Mimms, 434 U.S. 106, 110 (1977); Bristow, Police Officer Shootings–A Tactical Evaluation, 54 J.Crim.L.C. & P.S. 93

(1963).

The Court has "expressly declined to accept the argument that traffic violations necessarily involve less danger to officers than other types of confrontations," Pennsylvania v. Mimms, supra, at 110, and has recognized "that a significant percentage of murders of police officers occurs when the officers are making traffic stops." United States v. Robinson, 414 U.S. 218, 234 n. 5 (1973).[3] These considerations should be a part of the basis for evaluating the armrest frisk in this case.

A. The Michigan Court's analysis of risk to officers in such situations as this was unrealistic and impractical.

The Michigan Supreme Court concluded that because Respondent Long was outside the vehicle with an officer between him and the door at the time of the vehicular frisk, the frisk could not be justified by safety considerations. This view was unrealistically narrow.

First, the Michigan Court assumed that the preferable procedure was for Deputy Lewis to maintain a constant physical body-block posture between Long and the car door. This assumption would require the officer to jockey for position throughout the entire investigation. Instead, it is preferable for the officer to secure the safety of the scene so that he can peacefully concentrate on the investigation. See, e.g., Adams v. Williams, supra, 407 U.S. at 146; Cf. R. Adams, T. McTernan & C. Remsberg, supra note 1, at 69. The Michigan court's holding in this case would mean that the slightest distraction could allow the driver to lunge for the vehicle door and any weapon inside. Cf. Id. at 86.

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3 Cf. R. Adams, T. McTernan & C. Remsberg, Street Survival: Tactics for Armed Encounters 26 (1980) (police training manual for dealing with potentially armed persons). In addition to the danger posed by "routine" traffic stops, a large percentage of officer fatalities occurs during other encounters not involving arrest; approximately 19% occur during disturbance calls and 8% during "investigations of suspicious persons or circumstances." Id. at 25.

Furthermore, the Michigan court's approach ignores the possibility that circumstances may prevent the officer from even attempting to maintain constant interposition with his own body. For example, the stop may occur on a narrow urban freeway leaving little safe shoulder space. Alternatively, the officer may desire to conduct field testing for intoxication by having the suspect walk (a procedure that might have been called for in this case). An infinite number of other circumstances may similarly prevent the constant body-block approach preferred by the Michigan Court. As Chief Justice Warren said in Terry v. Ohio, 392 U.S. 1, 15 (1962), "No judicial opinion can comprehend the protean variety of the street encounter."

In addition, there are frequently practical reasons for allowing the driver to re-enter the vehicle. If (as happened in this case) his license or registration remain in the car, the most practical course may be for the driver to obtain them. Failure to conduct the armrest frisk under the circumstances of this case would then be both dangerous and unprofessional.[4] It may also be necessary for an officer to return to his own vehicle to obtain a clipboard or a flashlight, and he then could not remain between the driver and the car door. Still another possibility, noted by the Michigan Chief Justice in dissent, was that the officers might have permitted Respondent Long to drive away, in which event he would have ready access to whatever weapons might be secreted anywhere in the vehicle. Given Respondent Long's drug-influenced and erratic bahavior, it was particularly proper for the officers to

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4 The alternative, and perhaps the more typical and better approach, is for officers in this situation to search for and retrieve the license and registration themselves. This search would require greater intrusion than the minimal frisk in question here, and would moot the issue. The point, however, is that an officer should not be constitutionally prohibited from using the less intrusive approach of a brief, superficial weapons search followed by allowing the driver to obtain his papers if that is the more practical alternative. The point, further, is that since Long's papers were apparently in the vehicle, some intrusion was necessary here in either event.

consider the danger he posed to them upon release. [5]

Finally, the Michigan Court's analysis fails to take account of such possibilities as a stop taking place in the vicinity of a hostile crowd, or even of such commonplace variations as the presence of passengers in the vehicle. Thus, for example, in New York v. Belton, 101 S.Ct. 2860 (1981), the automobile had four occupants, and the single arresting officer "split them up into four separate areas of the Thruway . . . so they would not be in physical touching area of each other." This Court nevertheless upheld, as incident to arrest, a search of the passenger compartment Belton had recently occupied.[6] The Court concluded that "articles inside the relatively narrow compass of the passenger compartment of an automobile" are "generally, even if not inevitably, within 'the area into which an arrestee might reach in order to grab a weapon or evidentiary item' " even when he is outside the car and situated at a different corner of the intersection. 101 S.Ct. at 2864 (emphasis added). Although different from the present case in that it involved a search incident to arrest rather than the brief frisk at issue here, Belton exemplifies the sort of realistic and workable approach that should be adopted here.

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5 In addition, the Michigan Court failed to take account of the substantial likelihood that officers may have further contact with a driver such as Long even after they release him. When a subject exhibits erratic behavior, particularly owing to drugs or alcohol, a second or third encounter on the same evening is not unlikely. For example, Terry v. Ohio, supra, 392 U.S. at 14 and n. 9, recognizes that an officer may choose not to arrest a marginally alcohol-influenced driver. The officers considered such an approach here. In that event, if the driver happens to be armed, a second encounter presents extremely high risk to the officers.

6 This court stated, "While the Chimel case established that a search incident to an arrest may not stray beyond the area within the immediate control of the arrestee, courts have found no workable definition of 'the area within the immediate control of the arrestee' when that area arguably includes the interior of an automobile and the arrestee is its recent occupant." 101 S.Ct. at 2864. The Court established such a "workable rule" by allowing the intrusion in the entire "category of cases" involving vehicular arrests.

B. The brief vehicular frisk undertaken here was a proper response to danger signals that would have been perceived by any professional officer.

Before Officer Howell conducted the armrest frisk in this case, he knew a number of facts that would have alerted any well-trained officer to possible danger.[7] Under these circumstances, it would have been unprofessional and a failure of duty not to have conducted the frisk undertaken here.

Police training manuals emphasize that every situation and every suspect must be regarded as unpredictable.[8] *"Never underestimate a suspect . . .* [Y]ou will come into contact with a great variety of people under many different circumstances . . . remember, you are not a mind-reader. You have no way of telling what the subject may be thinking." G. Sylvan, Defense and Control Tactics 70 (1971) (emphasis in original). "It is impossible to predetermine a person's reaction to police restraint." E. Williams,

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7 Respondent Long had driven at 71 miles per hour and had parked partially in a ditch. Long was "under the influence of something." Officer Howell also knew that, on two occasions, Long had refused to comply with reasonable requests that he produce his license and that he furnish his registration and proof of insurance. He had observed Long attempt to re-enter the open car door, and he knew that, had Long reached the car door, he would have had access to a 4-inch knife that could readily be used to kill either officer. Finally, before frisking the vehicle, Officer Howell knew that there was "something leather" under the armrest, and he knew that this item could have been or contained a weapon. This observation was made while the officer was still outside the car, using only his flashlight as an aid.

The observation of "something leather" fell within the plain view doctrine. To this point, the officer's actions had not become a search, or even a frisk. Thus the armrest frisk should be evaluated under all the facts–including Long's erratic behavior, his apparent intoxication, his attempt to re-enter the car, the long-bladed knife, and the observation of something leather.

8 See also, e.g., Washington v. Chrisman, 102 S.Ct. 812 (1982) (recognizing that every arrest must be conducted with the realization that the suspect's actions are unpredictable).

Modern Law Enforcement and Police Science 199 (1967). Publications of the American Bar Association also agree with this concept:

> Most persons stopped for interrogation do not constitute any threat to the safety of the interrogating officer. This is true even though they may be guilty of some offense. But recognizing that most persons interrogated are harmless only emphasizes the fact that some are not. Officers are sometimes attacked . . . . In addition, *there is no way officers can identify in advance which suspects are likely to be dangerous.*
>
> *The officer's lack of ability to predict reliably whether a particular suspect is armed and dangerous, combined with the high degree of danger to him if he makes a wrong guess,* results in the officer's feeling that he must constantly be on guard.

Tiffany, Police Action Taken for Self-Protection, in American Bar Foundation, Detection of Crime 44-45 (1967) (emphasis added). This work recognizes, as the Michigan Supreme Court did not, that an officer meets hundreds or thousands of unpredictable people in a career, and yet he cannot afford to underestimate even one. This American Bar Association publication also indicates that the "frisk" is a common means of police response to such unpredictability.[9]

A familiar situation is presented in the "hundreds of cases where policemen lost their lives simply because they allowed [a suspect] to go into the bedroom to get his coat prior to going to the station, or to go to the bathroom, or to get a drink of water, *lock his automobile or any one of a number of last minute chores. In each case, the [suspect] returned*

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9 See also R. Adams, T. McTernan & C. Remsberg, supra note 1, at 77; R. Clift, A Guide to Modern Police Thinking 186-87, 192 (3d ed. 1970).

with a weapon and killed the officer." R. Clift, supra at 192 (emphasis added).[10] Every experienced officer recognizes the danger presented by the precise fact situation in the case at bar. For example, Houston Police Academy Instructor J. W. Conley reports that on one occasion, while in the patrol division, he encountered a driver who offered to "go back to the car to get my license." Officer Conley refused the offer, went and looked himself, and found a fully loaded and cocked .45 calibre weapon in the seat, precisely where petitioner Long's armrest was located in the present case. Interview with J. W. Conley, Houston Police Academy Instructor, by David Crump, in Houston, November 9, 1982.

The Michigan Court's analysis would prevent officers from using consistent, systematic procedures to minimize the effects of this unpredictability. In contrast, police training, as well as the decisions of this court, emphasize the desirability of officers "following the same procedures" in all similar cases.[11] R. Adams, T. McTernan & C. Remsberg, supra noted, at 94. Thus "vehicle approaches should be viewed [similarly] *regardless* of the motorist involved. Repetition . . . forms good . . . habits." Id. at 77

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10 In one such incident that is given as an example in a police training book, the officer told the husband in a domestic disturbance to "go get your shoes and shirt on. You're going to jail." Without a word, the husband went into the bedroom, returned with a rifle, and shot and killed the officer, his wife and himself. P. Brooks, Officer Down: Code Three 136 (1975). This same scenario was repeated on September 19, 1977, when officer David Huerta of the Houston Police Department used a suspect's telephone to report his location and was killed by the suspect, who obtained a shotgun from the bedroom, where the officer had allowed him to go unattended. Interview with Assistant Chief John Bales, Houston Police Department, by Susan Crump, in Houston, July 27, 1981.

11 The training manuals also emphasize the importance of avoiding "overconfidence" and they caution against the belief that the officer "can face down any danger that threatens [as] a matter of will and bravado." Such an attitude is dangerous not only to the officer, but to others with whom he may come into contact. Unprofessional approaches are likely to result in injuries to bystanders or to the sub-

(emphasis in original). The essence of professionalism is the use of careful, systematic processes. For these reasons, this court has emphasized the need to "establish [a] workable rule [in] this category of cases [i.e., cases involving automobile interiors when a suspect has been removed from them]." New York v. Belton, supra, 101 S.Ct. at 2864. As one commentator has written,

> A highly sophisticated set of rules, qualified by all sorts of ifs, ands, and buts and requiring the drawing of subtle nuances and hairline distinctions, may be the sort of heady stuff upon which the facile minds of lawyers and judges eagerly feed, but they may be "literally impossible of application by the officer in the field."

LaFave, Case by Case Adjudication Versus Standardized Procedures: The Robinson Dilemma, 1974 Sup.Ct.Rev. 127, 142, cited in New York v. Belton, supra, 101 S.Ct. at 2863.

II. THE VEHICULAR FRISK HERE WAS LESS INTRUSIVE THAN OTHER PROCEDURES APPROVED BY THIS COURT FOR OFFICER SAFETY.

A. In insisting that Terry only covered searches of persons, the Michigan Court reversed the proper priorities, because the fourth amendment "protects people, not places," and the vehicular frisk at issue was actually less intrusive than a frisk of a person.

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ject of the investigation, as well as to the officer.

Hence the manuals warn police trainees against what they call the "Superman syndrome," in which officers influenced by the heroes of television police programs or Western movies fail to undertake sensible self-protection procedures and thereby precipitate violent encounters that could be avoided. See R. Adams, T. McTernan & C. Remsberg, supra note 1, at 40. The Michigan Court's opinion, if affirmed by this Court, will inadvertently contribute to this syndrome.

The Michigan court's most anomalous conclusion was that the rationale of Terry did not apply because "Terry authorized only a limited pat-down search of a *person* suspected of criminal activity. That case did not authorize the search of an area." 413 Mich. at _____, 320 N.W.2d at 869 (emphasis in original).

This reasoning is precisely opposite traditional fourth amendment values. It exhalts places over persons. But this Court has held that the fourth amendment "protects people, not places." United States v. Katz, 389 U.S. 347, 351 (1967). Rather than preferring a pat-down of the individual's body, the Michigan Court should have preferred the less intrusive frisk of the vehicle.[12]

Indeed, Terry itself shows that the vehicular frisk should be considered less intrusive. In Terry, the Chief Justice emphasized the "severe . . . intrusion upon cherished personal security" represented by a personal frisk, even though the Court upheld the frisk at issue there. "Even a limited search of the outer clothing for weapons . . . must surely be an annoying, frightening, and perhaps humiliating experience." 392 U.S. at 24-25. The Court fully recognized the bodily invasion it was approving by quoting from a police training manual, as follows:

> Consider the following apt description: "[T]he officer must feel with sensitive fingers every portion of the prisoner's body. A thorough search must be made of the prisoner's arms and armpits, waistline and back, the groin and area about the testicles, and the entire surface of the legs down to the feet."

Id. at 17 n. 13. The Chief Justice even considered that some

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12 Thus, for example, while a person may have a privacy interest in an inanimate object, invasion of that interest may be justified when similar invasion of the person would not be. Cf. United States v. Place, 660 F.2d 44 (1st Cir. 1982), cert. granted (51 U.S.L.W. 3023, Aug. 3, 1982), and authorities therein cited.

such bodily contact might be intentionally misused, as a part of "agressive patrol" or even "wholesale harrassment" designed "to maintain the power image of the beat officer." Id. at 14-15 & n. 11. Thus, concludes the Terry opinion, the bodily frisk "is a serious intrusion upon the sanctity of the person, which may inflict great indignity and arouse strong resentment, and it is not to be undertaken lightly." Id. at 17.

The vehicular frisk at issue here is strikingly less intrusive; it presents virtually none of these disadvantages. The raising of an armrest in a car is simply not "an annoying, frightening, and . . . humiliating experience." It is not "a serious intrusion upon the sanctity of the person, which may inflict great indignity." Furthermore, the likelihood of its being used as a means of "wholesale harrassment" is small, and it cannot "maintain the power image of the beat officer." In fact, the intrusion involved in this armrest frisk was insignificant compared to the stop itself or the pat-down of Respondent's person.

B. The frisk was consistent with the rationale underlying Terry and with other decisions of this Court.

Terry depends upon "balancing the need to search [or seize] against the invasion which the search [or seizure] entails." Terry v. Ohio, supra, at 21. One element of this balance, the "nature and quality of the intrusion," id. at 24, is comparatively small in this case, for the reasons given above. The opposing interest is high.[13] Cf. Id. at 24.

More persuasively, the case of Peters v. New York, 392 U.S. 40, 66 (1968), decided simultaneously with Terry as a com-

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13 "When an officer is justified in believing that the individual whose suspicious behavior he is investigating at close range is armed [petitioner Long's possibly prohibited knife had already been discovered], . . . it would appear to be clearly unreasonable to deny the officer the power to take necessary measures to determine whether the person is in fact carrying a weapon and to neutralize the threat of physical harm."

panion case to Sibron v. New York, constitutes a firm, if implied, rejection of the Michigan Court's reasoning that physical means such as body position remove the right to frisk. In Peters, the officer was actually holding the suspect at gunpoint when the pat-down occurred. A suspect disabled by a drawn weapon would appear as ostensibly harmless as a suspect standing at the rear of a vehicle with an officer between him and the car door, as in this case. However, the Peters court upheld the officer's frisk as appropriate because it enabled the officer to proceed to conduct a calm, deliberate investigation.[14] The same result should follow more clearly in the case of this less intrusive frisk.

III. IF THERE WERE NO MEANS FOR A BRIEF VEHICULAR FRISK IN CIRCUMSTANCES SUCH AS THIS, OFFICERS WOULD BE FORCED INTO AN ANOMALOUS "ALL OR NOTHING" APPROACH THAT WOULD LIKELY RESULT IN GREATER INFRINGEMENT OF PERSONAL PRIVACY.

In Terry, supra, 392 U.S. at 17, the Chief Justice warned against "A rigid all-or-nothing model of justification and regulation under the [Fourth] Amendment." Disallowance of intermediate responses, such as the frisk, might well force officers into the most severe patterns of behavior when less intrusive measures might suffice.

For example, officers might be induced to exercise their discretion to make a full-scale arrest that would otherwise be unnecessary. An immediate arrest of Petitioner Long might con-

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14 See also Pennsylvania v. Mimms, supra, 434 U.S. at 333 (the "important interest" in uniform practice of requiring occupants to exit vehicle outweighs "de minimis" intrusion); Adams v. Williams, supra (upholding officer's reaching into vehicle to retrieve invisible, but suspected, pistol found at drivers waist); cf. New York v. Belton, supra, 101 S.Ct. at 2864 (search incident to arrest; passenger compartment within "the area into which an arrestee might reach in order to grab a weapon or evidentiary item" even if he has exited vehicle).

ceivably have been justified here, in fact, under either the prohibited weapons statute or for driving under the influence. In many cases, the decision to arrest is a close judgment call. Thus the byproduct of the Michigan court's decision, if followed, would be the use of arrest as a substitute for the less intrusive frisk, in some situations in which that option is available.

Likewise, an officer's drawing of his gun before approaching a vehicle is an appropriate measure for some traffic stops in which drivers are suspected of serious felonies. This measure is perfectly lawful and could, indeed, be adopted in all cases, but it is generally not done because it is a serious invasion of the security of the detainee. But if the Michigan court's reasoning is followed, there will be more cases in which the reasonable officer will feel forced to investigate with his weapon ready because he is denied the intermediate alternative of a frisk.

In addition, a wide variety of other police behaviors might be inadvertently affected by the Michigan court's approach. Some police training manuals, for example, recommend that the officer "develop a 'no' complex" and "allow no privileges" to a detained suspect. E.g., R. Clift, supra, at 191-92; cf. Washington v. Chrisman, 102 S.Ct. 812 (1982) (recognizing that unduly restrictive reading of the fourth amendment would cause officers to disallow reasonable requests by detained persons).

CONCLUSION

The decision of the Michigan Supreme Court should be reversed. In its opinion, this Court should establish the "workable rule this category of cases requires," as it did in the similar case of New York v. Belton, 101 S.Ct. 2860 (1981), for vehicular searches incident to arrest.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that I have, in accordance with Rules 28.2-28.3 of this Court, served three copies hereof upon each counsel of record herein for a separately represented party, by depositing such copies, postage prepaid, in a United States Post Office, addressed to: Louis Caruso, Attorney General's Office, 610 Law Bldg., 525 West Ottawa, Lansing, Michigan 48913, and Jim Geary, Little & Geary, 107 W. Michigan, Suite 301, Kalamazoo, Michigan 49007.